



POTENTIAL LEGAL PITFALLS FOR PRODUCT CENTER PERSONNEL



As a result of teaming and technological access, we have more people in contact with contractors than before. To make sure everyone knows the rules about some potential problems that can develop, the TACOM-ACALA Legal Group offers the following for your guidance:

*** DON'T MAKE UNAUTHORIZED COMMITMENTS**

The Federal Acquisition Regulation (FAR) at Part 1.601 and 43.102 implements federal law by specifically providing that only Contracting Officers are empowered to make, change or modify contracts and other Government personnel shall not make commitments to buy supplies or services or "direct or encourage the contractor to perform work that should be the subject of a contract modification".

Unless you are a contracting officer, or are otherwise specifically authorized to buy goods and services for the Government (for example, through an IMPAC card), you may not bind the Government to pay for such things as software, training, or office supplies. With internet access, it has become increasingly easy to purchase these sorts of items, and it's important that you don't make such commitments. It's also important not to issue a direction under an existing contract. When Government personnel direct the contractor and the contractor acts on their direction in good faith, it may become a compensable "constructive change" to the contract. The contractor is required to notify the government of direction from a any Government official which should be added by amendment.

Paying for items outside normal contracting channels, or the action of adding the "constructive change" to the contract is subject to a very unpleasant process called a "Ratification". Because of the serious nature of a ratification, and the serious implications of a federal official exceeding his/her authority, only the Commanding General at TACOM-Warren has the authority to

approve it, regardless of dollar value. Even a simple request for additional reports or generating data could lead to the necessity for a ratification. Moreover, the contractor runs the risk that a ratification may not be approved and compensation may not be received.

All contracting actions or contract orders, no matter how small they may appear, are required to be executed by the Contracting Officer (or Contracting Officer's Representative, if one has been appointed) because they have the training to assure statutory compliance. One of the most serious statutory requirements is securing funds and assuring there is no violation of the Anti-Deficiency Act. Making a commitment on behalf of the Government in advance of obligating funds, or failure to obtain adequate funding required for any contract action, can result in administrative discipline, including suspension, removal from office, or reduction in grade. *In addition, a knowing and willful violation is punishable by a fine of up to \$5,000 and/or up to two years imprisonment, and violations must be reported to Congress.*

The bottom line is that any request, suggestion or direction to a contractor or any of its subcontractors must go through the contracting officer or the COR. The risks and consequences are simply too great. Neither you, the program, nor the contractor can afford to do otherwise.

*** DON'T RELEASE PROPRIETARY INFORMATION**

The Trade Secrets Act 18 U.S.C. 1905 provides that any officer or employee of the U.S. who releases proprietary information in any manner "not authorized by law" SHALL be fined not more than \$1,000, or imprisoned not more than one year, or both; and SHALL be removed from office or employment. (examples: a proprietary drawing or specification, or information about subcontractors, processes, equipment, financial standing, cost information, pricing or marketing strategy, or anything that's marked as proprietary (BUT it doesn't need to be marked proprietary to be protected))

*** DON'T RELEASE INFORMATION WITHOUT AUTHORIZATION**

There are statutes and regulations that permit parties who want Government-held information to go through proper procedures to get access. There are also statutes and regulations that limit what types of information can be released, and by whom, and provide penalties for violation. Unless specifically authorized

by someone who has the proper authority, you should never release information:

**that is procurement sensitive (for example, how a source selection is done, who the Government's testers and evaluators are, how testing is performed and what the results are, how competitors were scored in evaluation, details about technical proposals, prices)

**that is "pre-procurement" information-- the kind of information which, if given in advance, could result in a competitive advantage to a competitor. (examples: specific information about future requirements, what quantities the Government is going to buy, what type of performance the Government is looking for, what prices are expected) Remember, "advantage" can accrue simply by knowing these facts earlier and having more time to prepare a proposal.

** that is subject to privilege -- for example,

*** attorney-client privilege -- communications made to or from a Government attorney in deciding what course of action to take, or what the Government's position is with regard to a protest, claim, appeal or other action

*** pre-decisional privilege -- information, opinions, recommendations or communications to a person or group that has to make a discretionary decision

** that would contradict the Government's position in a dispute. You are always required to give full and truthful answers if you are called as a sworn witness in a legal proceeding; but outside the courtroom, you need never (and should never) volunteer information contrary to the Government's interest to vendors (or their counsel), to media, or to other non-Government personnel, either in private conversations or in public industry-Government conferences, etc.

Violations of procurement integrity provisions can result in criminal sanctions, including 5 years imprisonment, fines, or both; civil penalties of up to \$50,000, plus twice the amount of any compensation offered to or received by a federal employee; as well as administrative sanctions. In addition to penalties imposed by Army regulations, releasing information that is adverse

to the Government's interests may be construed as representational activities in violation of 18 U.S.C. 203 and/or 205, which carries a penalty of up to five years imprisonment and/or up to \$50,000 in fines.

*** that is subject to Privacy Act protection (for example, social security numbers, home addresses of other employees) or that is classified, "For Official Use Only", or is related to critical technology. (18 U.S.C. Sec. 793-794) Violation of these statutes can also result in civil, criminal, and administrative sanctions.*

Any questions concerning any of these pointers may be referred to the TACOM-ACALA Legal Group, either to your servicing attorney, or to K. Krewer, Chief, AMSTA-AC-GC, 28414, cc:mail kkrewer.